STATE OF MICHIGAN
IN THE SUPREME COURT

JOSEPH STAMPLIS and THEODORA STAMPLIS,

Plaintiffs-Appellants,

vs.

ST. JOHN HEALTH SYSTEM, d/b/a RIVER DISTRICT HOSPITAL, and G. PHILLIP DOUGLASS, D.O., jointly and severally,

Defendants-Appellees,

and

HENRY FORD HEALTH SYSTEMS, d/b/a HENRY FORD HOSPITAL,

Defendants.

Supreme Court
No. 126980; 127032

Court of Appeals
No. 241801

St. Clair Circuit
No. K01-1051-NH

126980
127032

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PLAINTIFFS' COMBINED SUPPLEMENTAL BRIEF IN OPPOSITION TO LEAVE/OTHER PEREMPTORY ACTION

EXHIBIT

PROOF OF SERVICE

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STATEMENT OF THE ISSUES

I Did The Court Of Appeals Properly Reverse The Summary Disposition The Trial Court Granted To River District Hospital?

Plaintiffs-Appellees say "Yes."

Defendants-Appellants say "No."

The Court of Appeals said "Yes."

The Trial Court would say "No."

II Did The Court Of Appeals Correctly Determine That The Stipulation Must Be Vacated To The Extent That The Dismissal of Dr. Douglass Results In The Dismissal Of River District Hospital?

Plaintiffs-Appellees say "Yes."

Defendants-Appellants say "No."

The Court Of Appeals said "Yes."

The Trial Court would say "No."

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INTRODUCTION

On July 8, 2005, this Court, pursuant to MCR 7.302(G)(1) directed the Clerk to schedule oral argument on whether to grant the Applications or take other peremptory action, and permitted the parties to file supplemental briefs within 28 days (Exhibit 3: Order). For the reasons set forth in Plaintiffs' November 15, 2004 Combined Response in Opposition to Defendants' Leave Applications and in this Supplemental Brief, the unpublished Court of Appeals opinion presents no issues of major significance and no conflict with the applicable law. Nor is the opinion clearly erroneous or substantially unjust to Defendants.

The Court of Appeals properly relieved Plaintiffs from the Judgment dismissing the Hospital. To the extent his continued presence in the suit is deemed necessary to hear and determine the vicarious liability of the Hospital, the Court of Appeals also properly set aside the stipulation dismissing Dr. Douglass. Based on the decision by the Court of Appeals, this Court should deny leave/peremptory relief, affirm the Court of Appeals' decision reversing the trial court's dismissal of Defendant River District Hospital and permit this case that has been pending for more than seven years to proceed to jury trial in the St. Clair Circuit Court.

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Law And Argument

I. Whether Accomplished By Relief From Judgment Or By Review Of The Erroneous Reconsideration Denial Order, The Court Of Appeals Properly Reversed The Summary Disposition Granted To River District Hospital.

This Court's supplemental briefing order directed the parties to address whether the trial court abused its discretion in failing to grant Plaintiffs' motion for relief from judgment or its motion for reconsideration. The Court of Appeals correctly found that summary disposition should not have been granted to the Hospital because the trial court erred at law in failing to effectuate the undisputed intent of Plaintiffs' counsel that was expressed by the trial court without disagreement by Defendants. Therefore, the trial court abused its discretion by entering, and then refusing to vacate the judgment under MCR 2.612.

The Court of Appeals properly granted relief from the judgment based on fraud, misrepresentation or misconduct by Defendants that was tantamount to a conspiracy. In addition to the argument and law in Plaintiffs' opening brief, the Court's attention is directed to Restatement (2d) Judgments §70 which provides in part:

> **"§70 Judgment Procured by Corruption, Duress, or Fraud**
> **(1) [A] judgment in a contested action may be**

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avoided if the judgment:

(a) Resulted from corruption of or duress upon the court or the attorney for the party against whom the judgment was rendered, or duress upon that party, or

(b) Was based on a claim that the party obtaining the judgment knew to be fraudulent.

(2) A party seeking relief under Subsection (1) must:

(a) Have acted with due diligence in discovering the facts constituting the basis for relief;

(b) Assert his claim for relief from the judgment with such particularity as to indicate it is well founded and prove the allegations by clear and convincing evidence; and ..." (emphasis added)

Comment (c) states that while defining the circumstances under which the conclusiveness of a judgment can be overcome on account of fraud is "especially difficult," ... "the critical considerations usually are whether the claim of fraud is well substantiated and not merely asserted at large and whether in the original action the victim had pursued reasonable precautions against deception." Comment (d) lists four elements for obtaining relief:

> "First, it must be shown that the fabrication or concealment was a material basis for the judgment and was not merely cumulative or relevant only to a peripheral issue. Second, the party seeking relief must show that he adequately pursued means for discovering the truth available to him in the original action. *** Furthermore, in some situations a litigant is entitled to be passive and unquestioning with respect to the proofs of another party. Thus, the cases allowing relief from fraud

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> practiced by a trustee often advert to the fact that a beneficiary should not have to anticipate a trustee's deliberate falsification of the accounts he presents to the court.
>
> Third, the applicant must show due diligence after judgment in that he discovered the fraud as soon as might reasonably have been expected. ***
>
> Finally, the party seeking relief must demonstrate, before being allowed to present his case, that he has a substantial case to present, and must offer and convincing proof to establish that the evidence underlying the judgment was indeed fabricated or concealed."

As the Court of Appeals implicitly found here, all four of these elements were satisfied. The concealment here in open court went to the heart of the claim against the Hospital. Plaintiffs' counsel was diligent in attempting to discover the truth, but the trial judge, eager to move forward, interposed and assured Mr. Kenney that Defendants understood the effect of the stipulation. The Hospital's attorney who signed the stipulation had a duty as an officer of the court to speak up and apprise the court and Plaintiffs that the Hospital would not agree to the release of its agent without expecting that the Hospital itself would be released as well. Plaintiffs moved for relief from judgment immediately. Clearly, Plaintiffs had a substantial case to present.

Under any standard of review, the Court of Appeals recognized the wholly unjust effect of the trial court's

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ruling. This Court should deny Defendants any relief from the honorable and just ruling by the Court of Appeals.

The Court of Appeals also found that the trial court should have granted relief based on mistake. With respect to mistake, Restatement (2d) Judgments §71 provides in relevant part:

> **"§ 71 Judgment Based on Mistake**
>
> **Subject to the limitations stated in § 74, a judgment rendered in a contested action may be avoided if the judgment resulted from a mistake of law or fact and:**
> **(1) During to the course of the action the party seeking relief had made a reasonable effort to ascertain the matter with respect to which the mistake was made, and**
>
> **(2) The mistake:**
>
> **(a) Consisted of a failure to express the judgment of the court; or**
>
> **(b) Was such that allowing its correction by relief from the judgment will obviate an appeal in which the mistake is certain to result in reversal, or will similarly expedite ultimate decision in the action; or**

Comment (d) further explains:

> *d. Due diligence (Subsection (1)).* The requirements concerning due diligence with regard to relief based on mistake are essentially similar to those applicable to relief on the ground of fraud. See § 70, Comment *c*. The requirement that reasonable effort to ascertain the matter in question have been used during the course of the action is, in modern procedure, an insuperable barrier to relief except in very unusual cases. Modern discovery procedure affords virtually unlimited means of ascertaining facts that are not

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deliberately concealed. Failure to have ascertained matter that could have been uncovered by discovery procedure should preclude relief except when the failure is itself excusable. If the action is in a tribunal whose procedure does not provide for discovery, then the question is whether the opportunity for unofficial pretrial discovery and for discovery at trial had been exploited with reasonable vigor."

Here for the reasons set forth in Judge Gage's and Judge Kirsten Frank Kelly's opinions, and Plaintiffs' opening brief, Plaintiffs exhibited all due diligence and the facts of this case establish the kind of mistake by the trial court in dismissing River District Hospital that our appellate courts are bound to correct. The Court of Appeals properly reversed the trial court.

II. To The Extent That The Dismissal Of Dr. Douglass Results In The Dismissal Of River District Hospital, The Court Of Appeals Correctly Determined That The Stipulation Must Be Vacated.

This Court's July 8, 2005 Order permitting supplemental briefs directed the parties to address whether the doctrine of res judicata applies to the stipulated order dismissing the suit against G. Philip Douglass. Plaintiffs have clearly maintained from the start of this controversy that Dr. Douglass can be dismissed provided that the effect of Dr. Douglass's dismissal is not also the dismissal of River District Hospital.

Counsel for Dr. Douglass has feigned concern about

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continued legal exposure by way of judgment or indemnification if the terms of the stipulation are not enforced, but the prospect of this happening is nil. His trial court attorney, Jane Garratt, first represented both he and the Hospital, then represented only Douglass and then finally reappeared as co-counsel for the Hospital. Coupled with the Hospital attorney's sham designation of Dr. Douglass before trial as the designated representative for River District Hospital (Douglass Exhibit D: Tr 4/16/02, p 21), even though the Hospital already had two other employees present, so intertwines these Defendants, that a falling out between them and an indemnification suit by the Hospital lies beyond incredulity. For Plaintiffs' part, as they proposed more than three years ago, if they are allowed to proceed against the Hospital, the claim against Dr. Douglass will be dismissed.

Just one day after the open court discussion about the intended scope of the Douglass dismissal, Plaintiffs' counsel Jeremiah Kenney explained his reliance upon the trial court's clear expression of all Defendants' understanding at those April 16, 2002 proceedings:

> THE COURT: Did anyone authorize you to have the right to continue to proceed against the hospital in the course of the entry of the order? Is there anyone in that order that gives you the specific authorization?

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MR. KENNEY: **I did not--I didn't think I had to, Judge, because we had the agreement in chambers on the record. I thought what this order did was give effect to the agreement that we had placed on the record. And the manner in which this was done - - it doesn't state - - clearly it does not say that.**

THE COURT: The question I have to address is who was your agreement with. Was it with counsel for Doctor Douglass only, or is it with counsel for Doctor Douglass and counsel for River District Hospital?

MR. KENNEY: My agreement was with Doctor Douglass's lawyer. But the intent of the dismissal was not to dismiss him with prejudice to operate his [sic: as] *res judicata*. That's what I said three times and that's the intent of my statement here. I do not intend - - "What I don't want to face, Judge, is that I have dismissed the claims against the hospital for the actions of Doctor Douglass ." That's what I specifically indicated was my intent in dismissing Doctor Douglass. I do not intend to dismiss the claims against the hospital for the actions of Dr. Douglass. (Douglass Exhibit E: Tr. 4/17/02, p 28-29)(emphasis added).

Reading these transcript excerpts in full, it is crystal clear that every attorney in the courtroom knew exactly what Mr. Kenney was doing when he dismissed Dr. Douglass. He was asserting Plaintiffs' right to proceed to trial against the Hospital. The Hospital cannot claim ignorance of Plaintiffs' intent when Mr. Valitutti signed the stipulation. What Mr. Kenney did not know on the morning of April 16, 2002 was that, two hours later, the Hospital's "tag-team" attorneys would use a loophole in the writing the parties subsequently

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executed to persuade the trial court to dismiss the Hospital too. This Court should not condone Defendants' "sporting theory of justice" - - that a defendant ought to be given a fair opportunity to beat the case even if it can do this only by surprise or ambush. See Martin v Johnson, 87 Mich App 342, 348 (1978) [*res judicata* inapplicable to bind insured by adverse decision in suit by insurer because it would "encourage a more or less sporting theory of justice"].

Dissenting Court of Appeals Judge Murray would have affirmed the trial court because there was nothing in the written stipulation signed by the parties "indicating that the intent of the parties in agreeing to the dismissal of Dr. Douglass was to preserve the claims against River District." (Exhibit 1: Murray dissenting p 4). But, Judge Murray's opinion ignores the well-settled law which holds that:

> "The language of a stipulation will not be so construed as to give the effect of waiver of a right not plainly intended to be relinquished. Rossello v Trella, 206 Mich 20, 254 [1919]. See 21 MLP Stipulations, §4, p 160." The stipulation is to be interpreted with reference to its subject matter, and is to be read in light of the surrounding circumstances and the whole record. Whitley v Chrysler Corp, 373 Mich 469, 474 (1964).

It cannot be concluded in this case that Plaintiffs "plainly intended" to waive their right to try their claim against the Hospital.

Further, the focus by Defendants upon the parties' April

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16, 2002 stipulation has always been upon the fact that the dismissal to Douglass was "with prejudice," and the fact that Plaintiffs' counsel's statements in open court preserving the claim against the Hospital were not explicitly preserved in the stipulation. It is equally important to recognize that the writing lacks any language explicitly releasing "all other parties, firms, or corporations who are or might be liable." Cf: Romska v Opper, 234 Mich App 512, 514 lv den 461 Mich 927 (1999). Judge (now Justice) Markman's majority opinion in Romska affirmed the trial court holding that the broad language of the release given to one driver and insurer also released a second driver and his insurer in the three-car accident. Cf: Batshon v Mar-que General Contractors, Inc, 463 Mich 646 (2001) [per curiam opinion contrasting Romska and unanimously holding that expansive language was limited to more narrowly defined persons and entities being released]. The standard form release in Romska, unlike the stipulation here, contained an "explicit merger clause that independently precludes resort to parol evidence." 234 Mich App at 516. Justice Markman also found "no evidence," unlike here, that the release was not fairly and knowingly made.

Here, it is clear that Plaintiffs did not intend to release the Hospital and would have vigorously objected had such language been included in th stipulation. The

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surrounding circumstances are obvious. Under such circumstances, the stipulation was not knowingly entered into by Plaintiffs' counsel.

The holding at the Court of Appeals also comports with Restatement (2d), Torts §885 which provides in relevant part:

> **"(1) A valid release of one tortfeasor from liability for a harm, given by the injured person, does not discharge others liable for the same harm, unless it is agreed that it will discharge them. (2) A covenant not to sue one tortfeasor or not to proceed further against him does not discharge any other tortfeasor for the same harm."**

The Restatement(3d) of Torts (2000): Apportionment of Liability, §24 Definition and Effect of Settlement Reported Notes, Comment b History, remarks that "The one-settlement-releases-all rule may be the most widely and harshly criticized legal rule of all time" (citations omitted). Section 24(b) unequivocably resolves the controversy:

> **"(b) Persons released from liability by the terms of a settlement are relieved of further liability to the claimant for the injuries or claims covered by the agreement, but the agreement does not discharge any other person from liability."**

As the majority at the Court of Appeals recognized, "the transcript of the parties' oral argument clearly reflects the parties' intentions and understandings" (Exhibit 1: Gage Opinion, p 6). The majority declined to apply Larkin v Otsego Memorial Hospital Assn, 207 Mich App 391 (1994) lv den 450 Mich 866 (1995), because they did not want to broaden

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that holding to include the oral discussions in this case and because they found that the misconduct of defense counsel in this case made reliance upon the Larkin decision unnecessary (Exhibit 1: Gage Opinion p 6). The majority also accepted Defendants' argument that Larkin could be distinguished because the parties here never explicitly agreed that Dr. Douglass was the Hospital's agent (Exhibit 1: Gage Opinion, p 5). But, the subsequent dismissal of the Hospital by the trial court certainly moots this point.

In Larkin, the majority, over now Chief Justice Taylor's vigorous dissent, held that the agreement in that case was actually a covenant not to sue, with "the implication[] that the plaintiffs recognized that the codefendant hospital was the principal that could be held responsible for the negligent act of the agent and they would proceed against the hospital on that basis after the dismissal of [the doctor]." 207 Mich App at 396.

The principles of Larkin must be applied here. Larkin is controlling precedent that the trial court must be required to follow. In settling cases, trial attorneys and trial courts must be able to rely upon the clear import of a published Michigan Court of Appeals opinion like Larkin. Otherwise, the law lacks certainty.

Here, the oral statements were made by Mr. Kenney in

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open court, "I intend to ... proceed against ... the hospital" and "[W]hat I don't want to face, Judge, obviously is that I have dismissed the claims against the hospital for the actions of Dr. Douglass. I'm not doing that" (Douglass Exhibit D: Tr 4/16/02, pp 9-10). The Hospital's counsel stood there silently, and then without saying a word, signed the stipulation dismissing Dr. Douglass. Fairly read, this establishes the same implied agreement found by the Larkin majority.

Defendants assert that Theophelis v Lansing General Hospital, 430 Mich 473 (1987) requires this Court to affirm the trial court because Theophelis, construed MCL 600.2925d to continue the common law rule that "a valid release of an agent for tortious conduct operates to bar recovery against the principal on a theory of vicarious liability ..." Id. at 480, 493. In fact, as a matter of statutory construction, MCL 600.2925d plainly does not continue this common law rule.

Statutory interpretation is a question of law. People v Schaeffer, ____ Mich ____, 2005 Mich LEXUS 1190 *10 (Nos 126007, 127142 rel'd 7/27/05). When interpreting a statute, it is the court's duty to give effect to the intent of the Legislature as expressed in the actual language used in the statute. Halloran v Bhan, 470 Mich 572, 576 (2004). It is the role of the judiciary to interpret, not write, the law.

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Koontz v Ameritech Services, Inc, 466 Mich 304, 312 (2002). If statutory language is clear and unambiguous, the statute is enforced as written. People v Laney, 470 Mich 267, 271 (2004). Judicial construction is neither necessary nor permitted because it is presumed that the Legislature intended the clear meaning it expressed. Roberts v Mecosta Co Gen Hosp, 466 Mich 57, 63 (2002).

While the cardinal rule of statutory interpretation is to give effect to the intent of the Legislature, that intent must be ascertained from the actual text of the statute, not from extra-textual judicial divinations of "what the Legislature really meant." Mayor of Lansing v Mich PSC, 470 Mich 154, 164 (2004). "Rather than engaging in legislature mind-reading to discern [legislative intent], ... the best measure of the Legislature's intent is simply the words that it has chosen to enact into law." Id.

As to the effect of a release, covenant not to sue or covenant not to enforce judgment, MCL 600.2925d as amended in 1995 provides in relevant part:

> **"§600.2925d. Effect of release, covenant not to sue, or covenant not to enforce judgment.**
>
> **Sec.2925d. If a release or a covenant not to sue or not to enforce judgment is given in good faith to 1 of 2 or more persons for the same injury or the same wrongful death, both of the following apply:**
>
> **(a) The release or covenant does not discharge 1**

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or more of the other persons from liability for the injury or wrongful death unless its terms so provide.

From the unqualified words of §2925d(a), it is absolutely clear that the Legislature intended no exception to its general rule of nondischarge of other persons from liability absent specific language in the release or covenant not to sue specifically providing for such discharge. The plain meaning of the statute does not contemplate the continuation of the common law rule that the settlement with the active tortfeasor also dismisses the passive tortfeasor.

It is true that statutes in derogation of the common law must be strictly construed, and will not be extended by implication to abrogate established rules of common law. The statute, however, must be construed sensibly and in harmony with the legislative purpose. Rusinek v Schultz, Snyder & Steele Lumber Co, 411 Mich 502, 508 (1981).

This Court has already construed Michigan's contribution for joint tortfeasor's statute MCL 600.2925a which was enacted at the same time as MCL 600.2925d. Both statutes are based upon the Uniform Contribution Among Tortfeasors Act. See Donajkowski v Alpena Power Company, 460 Mich 243 (1999). In Justice Griffin's lead opinion in Theophelis, he focused upon the meaning of the word "tortfeasors" in §2925d which has since been deleted by the 1995 amendment which

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substituted "the person" for "the tort-feasor" and "other person for the injury or wrongful death" for "other tortfeasor." Justice Griffin concluded, wrongly Plaintiffs assert, that because the statute does not specifically include vicarious liability situations in its language, it "leav[es] in place the deep-rooted common law principle that the release of [the agent] would discharge his principal. Plaintiffs believe, with no disrespect intended the Justice Griffin, that the lead opinion in Theophelis engages in exactly the type of "legislative mind-reading" that this Court rejected in Mayor of Lansing, supra. The words the Legislature has chosen in promulghating §2925d are clear and the best measure of its intent is that the common law principal agent exception was also abrogated by the express words of the statute.

The decisions of other jurisdictions and analysis of the Restatements demonstrate the clear trend toward refusing to give preclusive effect to the principal when the agent is dismissed. In JFK Medical Center, Inc v Price, 647 So 2d 833 (Fla 1994), the Florida Supreme Court on facts similar to this case, held that the voluntary dismissal with prejudice of the physician active tortfeasor, did not dismiss the passive tortfeasor medical center because it was not equivalent to an adjudication on the merits. The Florida

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Supreme Court first quoted the Restatement (Second) of Judgments, §51 (1982) entitled "Persons Having a Relationship in Which One Is Vicariously Responsible for the Conduct of the Other" which provides in relevant part:

> **"If two persons have a relationship such that one of them if vicariously responsible for the conduct of another, and an action is brought by the injured person against one of them, the judgment in the action has the following preclusive effects against the injured person in a subsequent action against the other.**
>
> *** * ***
>
> **(4) A judgment by consent for or against the injured person does not extinguish his claim against the person not sued in the first action ... ."**

The comments to subsection (4) state:

> *"f. Judgment by consent (Subsection (4)).* The settlement of a claim against one of several obligors generally does not result in the discharge of others liable for the obligation. This rule applies when the obligation is reduced to judgment, see § 50, and even though the liability of one obligor is derivative from another under principles of vicarious responsibility. Moreover, a judgment by consent, thought it terminates the claim to which it refers, is not an actual adjudication. See § 27, Comment e. The considerations that lead to denying issue preclusive effect to consent judgments, chiefly the encouragement of settlements, are applicable when an injured person has claims against more than one person for the same wrongful act. It is therefore appropriate to regard the claim against the primary obligor and the person vicariously responsible for his conduct as separate claims when one of them has been settled. Any payment received by the injured person in such a settlement, however, discharges pro tanto the obligation of the other obligor to

pay the loss." See § 50(2).[1]

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[1] Douglass's argument at IIA of his Application is without merit. An appellate court has the power to open or vacate a judgment upon good cause shown whether entered by consent or not. J.L. Hudson Co. v Barnett, 255 Mich 465, 469 (1931).

As with other judgments, a party may be granted relief from a consent judgment for the reasons enumerated in MCR 2.612. Trendell v Soloman, 178 Mich App 365, 369-370 (1989) lv den 434 Mich 891 (1990) [once consent judgment is entered, it becomes a judicial act and possesses the same force and character as a judgment rendered following a contested trial or motion]; Kiefer v Kiefer, 212 Mich App 176, 179 (1995) [Court of Appeals reviewing motion to set aside consent order modifying alimony brought pursuant to MCR 2.612(C)(1)(c) for fraud, misrepresentation or other misconduct]. Thus, for example, once a determination has been made that mutual mistake of fact occurred, a court has the power to correct that mistake by vacating the judgment even if it is a consent judgment. Gordon v Warren Planning & Urban Renewal Comm, 388 Mich 82, 89 (1972); Hews v Hews, 145 Mich 247, 254 (1906) [even consent order may be modified or vacated when it does not express real intent of parties even though mistake is unilateral]; Horning v Saginaw Circuit Judge, 161 Mich 413 (1910) [order modifying consent decree is final order which is reviewable only by appeal].

Ahrenberg Mechanical Contracting, Inc. v Howlett, 451 Mich 74 (1996), relied on by Douglass, actually supports Plaintiffs. In Ahrenberg, our Supreme Court's unanimous, *per curiam* opinion reversed the Court of Appeals' dismissal of an appeal that it had held barred because the order appealed from was a consent judgment. In Ahrenberg, as here, the appellant had timely sought circuit court relief, but to no avail. 451 Mich at 76. The Supreme Court's decision in Ahrenberg makes it clear that merely approving a proposed order as to form and substance does not bar appellate review particularly where the propriety of that ruling is later vigorously litigated in the circuit court and then promptly appealed. See also: Aubuchon v Farmers Ins. Exchange, 448 Mich 859 (1995) [reversing and remanding to Court of Appeals for consideration of substantive issues where judgment was challenged from outset in trial court].

Here, at the trial court, Plaintiffs timely sought relief under MCR 2.612(C) and specifically moved to "vacate the Order dismissing the Hospital, and revise the Order dismissing Dr. Douglass to make it clear that the agreement

continue...

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Further, citing to Fla Stat 768.31(5), the Court said that Florida's public policy under that statute would be compromised if it ruled otherwise. That Florida statute is essentially identical to MCL 600.2925d, and provides in relevant part:

> (5) RELEASE OR COVENANT NOT TO SUE.-When a release or a covenant not to sue or not to enforce judgment is given in good faith to one of two or more persons liable in tort for the same injury or the same wrongful death:
>
> * * *
>
> (a) It does not discharge any of the other tortfeasors from liability for the injury or wrongful death unless its terms so provide, but it reduces the claim against the others to the extent of any amount stipulated by the release or the covenant, or in the amount of the consideration paid for it, whichever is the greater ....

The Court reasoned that settlements would be encouraged by abolishing the common law rule that a discharge of one joint tortfeasor discharges all tortfeasors and therefore voluntary dismissal of the active tortfeasor, with prejudice, under the circumstances presented is not the equivalent of an adjudication on the merits, and such a dismissal will not bar continued litigation against the passive tortfeasor. 647 So2d at 834.

The West Virginia Supreme Court of Appeals reached a similar result in Woodrum v Johnson, 559 SE2d 908, 909 (WVa

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[1]...continue
was in the nature of a covenant not to sue that does not legally release Defendant River District Hospital."

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2001) concluding that "a plaintiff's release of a primarily liable defendant should not be permitted to have the potentially unintended effect of releasing other liable parties." The Woodrums settled with the physician and reserved their right to proceed against the hospital on a vicarious liability theory. The Court's majority recognized "broad and diverse disagreement among courts" on the issue and collected cases and annotations. The opinion listed nine jurisdictions whose highest court by way of statute or common law, "have rejected the proposition that the release of, or covenant not to sue, a primarily liable defendant extinguishes a plaintiff's right to obtain a judgment against a party that is derivatively liable." 559 SE2d at 913, n 10. The Court cited three jurisdictions, including Michigan's, in the Theophelis decision, which give preclusive effect only to releases. Id. The same note listed 8 state supreme court and three other intermediate state appellate decisions holding that plaintiff's right to pursue the principal is extinguished. Id.

Based on three considerations, the Woodrum majority concluded that:

> "[P]ermitting plaintiffs to enter into partial settlements with primarily liable parties without requiring them to necessarily forsake their right to pursue further action against parties whose liability is vicarious or derivative, encourages settlement in those instances where countervailing

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claims for indemnity are unlikely, thus permitting a negligent agent or employee who is without substantial financial resources to buy his or her peace. In virtually every other conceivable circumstance, the converse rule would be just as likely to obstruct settlement as it would be to promote it. This is particularly true because "at least some injured parties 'would be reluctant to settle with the servant or agent, and thereby extinguish his [or her] cause of action against the master or principal, unless he [or she] could settle with the servant or agent for' for full satisfaction (in which case the effect of the common law rule would be irrelevant)." 559 SE2d at 917-918.

The Court also reasoned that, practically:

> "[I]t may not always be possible for a settling plaintiff to determine at the time of partial settlement whether his or her claims against other non-settling defendants rest upon actionable conduct on the part of such defendants, or vicarious liability. It is easily conceivable that a plaintiff could release a primarily liable defendant at an early state of the litigation without obtaining full satisfaction for the underlying claim, on the assumption that the remaining defendants are directly liable, only to find out at a later point that the viability of his or her action against the non-settling defendants rests entirely upon theories of vicarious liability. 559 SE2d at 918.

Most significantly, pointing to the Indiana Supreme Court decision in Pelo v Franklin College of Indiana, 715 NE2d 365, 366 (Ind 1999), the West Virginia Court, stating that such a preclusive rule "would result in the creation of a perilous danger to the unwary plaintiff, a circumstance that most citizens would find both mystifying and untenable," spoke rather directly about the possibility of a situation

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similar to the one actually confronted by Plaintiffs here:

> "We agree with the Indiana Supreme Court that the rule advocated by the Hospital in this case, which would ignore the express intention of the parties to the settlement, sets a trap for those litigants who are unaware of the exception for cases based on derivative liability, notwithstanding the general rule ... that a release will operate as the parties intended. The law is not a game where the litigant with the lawyer who happens to know all the traps wins. To the extent possible rules of law should produce results consistent with the expectations of ordinary citizens. Surely most people, like the [plaintiffs], would be surprised to discover that the [plaintiffs'] release did not mean what it said when it purported to preserve their claim against [the derivatively liable defendant]. Accordingly, when parties sign an agreement releasing one defendant with the clearly expressed expectation that they will be able to proceed against others, that expectation should be given effect by the courts." 559 SE2d at 918.

Based on these authorities, and the clear language of §2925d, this Court should affirm the holding of the Court of Appeals and remand to the trial court where, if Defendants are willing, Plaintiffs will effectuate what they intended, and what Defendants and the trial court knew they intended, on April 16, 2002, a dismissal of Dr. Douglass and a trial against the Hospital.

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Relief Requested

For the reasons set forth in the majority and concurring opinions at the Court of Appeals, for the reasons in Plaintiffs' original Combined Response and in this Supplemental Brief, and because the claim of Mr. and Mrs. Stamplis remains in "legal limbo" more than eight years after Mr. Stamplis's catastrophic injury with no legal end in sight, this Court should immediately deny leave/peremptory relief, and remand this case for trial. Both law and equity compel this result, and this Court should decline to modify the just outcome at the Court of Appeals.

Respectfully submitted,

FIEGER, FIEGER, KENNEY & JOHNSON, PC

Dated: August 5, 2005

By: Victor S. Valenti

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STATE OF MICHIGAN
IN THE SUPREME COURT

JOSEPH STAMPLIS and THEODORA STAMPLIS,

Plaintiffs-Appellants,

vs.

ST. JOHN HEALTH SYSTEM, d/b/a RIVER DISTRICT HOSPITAL, and G. PHILLIP DOUGLASS, D.O., jointly and severally,

Defendants-Appellees,

and

HENRY FORD HEALTH SYSTEMS, d/b/a HENRY FORD HOSPITAL,

Defendants.

Supreme Court
No. 126980; 127032

Court of Appeals
No. 241801

St. Clair Circuit
No. K01-1051-NH

PROOF OF SERVICE

STATE OF MICHIGAN)
) SS.
COUNTY OF OAKLAND)

VICTOR S. VALENTI, being first duly sworn, deposes and says that on August 5, 2005, he caused to be served copies of Plaintiffs' Combined Supplemental Brief in Opposition to Leave/Other Peremptory Action with Supporting Exhibit and this Proof of Service upon:

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